SUPREME COURT, U. S.

MAR 27 1968

JOHN F. DAVIS, CLERK

No. 1270

IN THE

Supreme Court of the United States

October Term, 1967

DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON,

Appellees

On Appeal From the United States District Court for the Eastern District of Kentucky

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. B, *infra*, pp. 2a-8a) is unreported. A district court opinion of February 1, 1967, in this case (App. F, *infra*, pp. 15a-19a) was incorporated by reference in the opinion below; it is reported at 263 F. Supp. 268. This Court has written two previous opinions in this case; they are reported at 376 U.S. 665 and 382 U.S. 34.

JURISDICTION

This is a civil antitrust action brought by the United States under Section 4 of the Sherman Act, 15 U.S.C. § 4, to enjoin the consolidation[1] of two commercial banks[2] of Lexington, Kentucky, on the ground that the consolidation would violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. § § 1, 2. See *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964).

The United States District Court for the Eastern District of Kentucky ("district court") on December 29, 1967, entered a judgment (captioned "Order") (App. A, *infra*, p. Ia) which permitted appellants, Dages I. Boyle[3] ("Boyle") and Central Bank & Trust Co. ("Central Bank") to intervene as "parties plaintiff", but denied the relief sought in their respective motions and intervening complaints, viz: that the district court:

(1) refuse to enter a proposed consent judgment tendered by appellees on August 7, 1967;

(2) reconsider and reverse a prior (July 27, 1962) holding that the consolidation did not violate Section 2 of the Sherman Act; and

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[1] This consolidation is frequently loosely referred to in the pleadings, orders, judgments and memoranda as a merger. Under general corporation law it would be a merger, but under the bank statutes cited herein it is a consolidation.

[2] First National Bank and Trust Company of Lexington ("First National") and Security Trust Company ("Security Trust") consolidated under the charter of First National, whose name was changed to First Security Bank and Trust Company of Lexington ("First Security").

[3] Boyle, a stockholder in each of the banks, intervened both individually and as representative of First National and Security Trust.

(3) enforce its final judgment entered on March 18, 1965 in accordance with the final judgment of this Court rendered April 6, 1964 (376 U.S. 665) holding that the consolidation violated Section 1 of the Sherman Act.

On the same day (December 29, 1967) the district court entered the consent judgment (App. D, *infra*, pp. 10a-14a).

Boyle appealed from both judgments, and filed his notice of appeal in the district court on January 16, 1968.

The jurisdiction of this Court rests on Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. § 29. *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

STATUTES INVOLVED

(1) Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2, provides as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . .

(2) Section 2 of the Bank Merger Act of 1966,[4] 80 Stat. 7, provides as follows:

> (a) Any merger, consolidation, acquisition of assets, or assumption of liabilities *involving an in-*

[4] Herein called "the Act" unless the context clearly indicates the contrary.

sured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a *final judgment under the antitrust laws* prior to the enactment of this Act [Feb. 21, 1966], shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2) [section 2 of Title 15]. (emphasis added).

(b) No merger, consolidation, acquisition of assets, or assumption of liabilities *involving an insured bank* which was consummated after June 16, 1963, and prior to the date of enactment of this Act [Feb. 21, 1966] and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this Act [Feb. 21, 1966] may be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2) [section 2 of Title 15]. (emphasis added).

(c) Any court having pending before it on or after the date of enactment of this Act [Feb. 21, 1966] any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an *insured bank* consummated after June 16, 1963,

shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal Deposit Insurance Act [subsec. (c) (5) of this section], as amended by this Act. (emphasis added).

QUESTIONS PRESENTED

1. The primary question is whether the district court erred in:

(a) Refusing to enforce its final judgment of March 18, 1965[5] (requiring divestiture) and the final judgment of this Court rendered April 6, 1964,[6] solely because the district court concluded that the Act constitutionally vacated and nullified those judgments, and

(b) Entering on December 29, 1967, the so-called consent judgment tendered by appellees but not consented to by the intervening "parties plaintiff."

2. The answer to the above question turns on the answers to the following secondary and more specific questions:

A. Whether Congress usurped

(a) the exclusive power of the Judiciary to adjudicate (after a trial, hearing, or other proceeding meeting the requirements of due process of law) whether a statute has been violated by providing in Section 2(a) of the Act that it shall be "conclusively presumed" (adjudged) that certain transactions (including the consolidation of the

[5] When reference is made to this judgment it includes the order of clarification entered April 29, 1965.

[6] When reference is made to this judgment it includes the mandate filed in the district court May 4, 1964.

Lexington banks) did not violate any antitrust law other than Section 2 of the Sherman Act, and

(b) the exclusive power of the Judiciary to vacate final court judgments by providing in Section 2(a) of the Act that such presumption (adjudication) prevails over any unexecuted or partially executed "final judgment under the antitrust laws" holding contrary to such presumption, as do the aforesaid judgments of this Court and the district court.

B. Whether Section 2(a) of the Act, which vacates and nullifies the aforesaid judgments, violates the Due Process Clause of the Fifth Amendment by depriving the consolidated banks (First National and Security Trust), their stockholders and others of valuable *private rights vested under those judgments.*

C. Whether the Act violates the Due Process Clause of the Fifth Amendment because it arbitrarily and unreasonably grants discriminatory special benefits, such as (1) a conclusive presumption (adjudication) that antitrust laws *were not* violated, (2) a legislative vacation of "final" court judgments, (3) immunity from prosecution for violations of antitrust laws, and (4) special defenses for violating antitrust laws, to *all* the parties who participated in certain transactions "involving an insured bank", but *denies* any such benefits to any of the parties who participated in similar transactions in which an "insured bank" was not involved—even when all the parties to a transaction were non-insured banks.

D. Whether the district court had jurisdiction to enter the so-called consent judgment of December 29,

1967, in view of the fact that (1) no motion was filed in accordance with the Federal Rules of Civil Procedure (Rule 60(b)) to vacate its final judgment of March 18, 1965, and no order or judgment was entered vacating that judgment of March 18, 1965, and (2) no judgment or order of this Court was entered vacating its final judgment, rendered April 6, 1964, and its mandate to the district court "for further proceedings in conformity with the opinion of this court."

E. Whether, even if the Act is constitutional, the district court nevertheless erred in entering the consent judgment on December 29, 1967, for the additional reason that the consent judgment does not adequately cure the harmful effects of the violation of Section 2 of the Sherman Act, and the district court was not obligated to enter and should not have entered any judgment which does not adequately protect the public.

STATEMENT

The proposed consolidation was opposed by the Federal Reserve Board, the Federal Deposit Insurance Corporation and the United States, all of whom "concluded that the consolidation would adversely affect competition among commercial banks in Fayette County." (376 U.S. 665, 667).

First National and Security Trust agreed to consolidate under the charter of First National which was amended to change the name to First Security. First National and Security Trust did not lose their corporate existence. Under Title 12 U.S.C. § 215 and § 287.173 of the Kentucky Revised Statutes "the corporate existence" of each bank "continued" in the consolidated bank, First Security, which was "deemed to be the same corporation as each bank." Neither of

these banks lost their charter or corporate status because of the illegal merger.[7]

The district court stated in its opinion of December 29, 1967, that "the merger was consummated on March 1, 1961, ***." However, it appears that nothing occurred on that date other than the *hurried* execution of an agreement.

On that same day, March 1, 1961, the United States filed its complaint against First National and Security Trust alleging that it violated Sections 1 and 2 of the Sherman Act and requesting preliminary and permanent injunctions. On March 2, 1961, the United States filed a motion for a temporary order restraining the consolidation because of the practical problems which would be involved in a divestiture. On March 3, 1961, the United States amended its complaint and made First Security a party defendant and the three banks have remained and still are defendants in this action.

On March 6, 1961, the motion for the restraining order was denied by the district court *only* because representatives of the banks *assured* and *convinced* the court that they could and would keep separate records and operate the business of the consolidated banks in such a manner that divestiture would be feasible in the event such action should become necessary as a result of court decisions. Accordingly, the court entered an order on March 6, 1961 (App. I *infra,* pp. 26a-28a), which required First Security.

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[7] *In re Watkins' Estate,* 113 Vt. 126, 30 A. 2d 305 (Sup. Ct.), *cert. denied,* 319 U.S. 757 (1943); *Guardian Depositors Corp.* v. *Currie,* 292 Mich. 549, 291 N.W. 2 (Sup. Ct. 1940); *Commonwealth* v. *First Nat'l Bank & Trust Co.,* 303 Pa. 241, 154 Atl. 379 (Sup. Ct. 1931).

> keep and maintain its assets, liabilities, internal records and accounts in such manner that in the event the consolidation is ultimately adjudged to be dissolved and a separation is ordered, *capital stock, assets, liabilities and accounts can be equitably divided between the consolidated banks in accordance with their respective rights.*[8] (emphasis added).

Therefore, First National and Security Trust entered into and proceeded with this consolidation with full knowledge that it was opposed by responsible governmental agencies, and that the United States was of the opinion that it violated the Antitrust Laws and would attack it. Nevertheless, the banks persuaded the district court not to enter the restraining order and made it clear that they desired to assume all the risks involved in the illegal consolidation.

On July 27, 1962 the district court held that the consolidation did not violate either Section 1 or 2 of the Sherman Act. *United States* v. *First Nat'l Bank & Trust Co.*, 208 F. Supp. 457 (E.D.Ky.).

On April 6, 1964, this Court reversed the judgment of the district court and held (a) that the consolidation *violated* Section 1 of the Sherman Act and (b) that it was not necessary to decide whether it violated Section 2.

This Court's mandate requiring "further proceedings in conformity with the opinion of this court," was filed in the district court on May 4, 1964.

On July 2, 1964, the district court entered an order giving defendants until "September 1, 1964, to report

[8] This order sets out in great detail the manner in which the books and records were to be kept so that divestiture would be feasible.

to the court the progress made in complying with the judgment" of this Court. The time for making the report was, by a number of extensions, extended to February 16, 1965. On that date, First Security and the United States tendered a stipulation and proposed interlocutory decree with the representation that it would be another six months before the proposed plan of divestiture would be submitted.[9]

On Februuary 16, 1965, the district court also entered another order requiring *each of the three* banks "to show cause why this court should not appoint a special master to take over the books and records of the three banking institutions and to separate the businesses * * * and to place these institutions in the same position they were respectively, insofar as their business interests were concerned, as of the date of the merger, to-wit: March 1, 1961."

On March 2, 1965, First Security filed a response to the show cause order, eleven pages (26-37) thereof are devoted to showing that First Security had complied with the order of March 6, 1961, requiring records, accounts, and properties to be kept so that divestiture would be feasible. First Security, in connection with this response, filed the affidavit of its president showing that divestiture could reasonably be accomplished without a special master.

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[9] The facts before the district court disclosed (a) that all the parties to the action as well as the court had proceeded for several months upon the assumption that divestiture was required and (b) that the court was confronted with exasperating delays and procrastination. Apparently, the court believed that the report for which he had been waiting for several months would contain a proposed plan of divestiture and that the lack of such plan in the proposed decree showed that the parties had unreasonably delayed and procrastinated.

On March 18, 1965, the district court entered the aforesaid final judgment requiring divestiture (App. G, *infra,* pp. 20a-22a).

On April 14, 1965, First Security filed a petition for clarification of the March 18, 1965, final judgment. Twelve pages (7-19) of that petition emphasize again and again the importance of, and insist upon the fixing and protecting of, stockholders' rights (including their voting rights) and conserving the market value of their stock. To this end, the petition requested that specific detailed provisions be incorporated in the final judgment. The United States concurred in the petition and recommended adoption of the suggested provisions for the protection of the stockholders and fixing of their rights and valuable rights of First Security and First National. Thus, the United States and the defendant banks took cognizance of and insisted upon the fixing and vesting of valuable private rights, particularly of the stockholders and the two banks which would re-emerge by virtue of the divestiture as separate corporate entities. They were successful in their efforts—such rights were fixed—and the order of clarification was granted (App. H, *infra,* pp. 22a-25a).

The final judgment, as clarified on April 29, 1965, fixed and established, among other things, the following rights:

(a) A divestiture must be executed *"without delay,"*

(b) First National and Security Trust would be reestablished with separate assets, capital stock, deposits, loans, officers, directors, etc.,

(c) The name of the consolidated bank (First Security) would revert to First National, and First Na-

tional would *continue* as a separate corporate entity under its original charter but having *only* such assets and properties as remained after Security Trust was fully restored "as a separate competitive and independent commercial bank equivalent to the former Security Trust Company,"

(d) Stockholders would own stock in each of the respective banks and enjoy rights in respect thereto which were specified in detail and fixed, adjudicated and vested by the final judgment of March 18, 1965,[10]

(e) A trustee would hold all shares of the capital stock of the restored Security Trust for a period of time for the benefit of the stockholders during which time substantial voting rights and other rights and powers were vested in the trustee all as set forth in the final judgment, for the announced purpose of assuring independent management of the two banks.

The plan of divestiture was thus completed and both *private* and *public* rights were *interblended,* fixed and determined. All that remained to be done was the execution and supervision essential to carry out the final judgment of March 18, 1965. No appeal was taken from the district court's final judgment of March 18, 1965.

However, that judgment was not executed because the banks continued their policy of delay and procrastination until enactment of the Act (February 21, 1966). If the district court had received reasonable cooperation from the banks the dissolution, division, or distribution of assets mentioned in Section 2(a) of the Act would have occurred long before February 21, 1966, the date the Act was enacted.

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[10] All that stockholders had for their original investments were these judgment rights.

The United States, on April 28, 1966, laboring under the mistaken view that the Bank Merger Act nullified the final judgment of this Court and the final judgment of the district court, moved the district court to reconsider and reverse its prior holding that the consolidation did not violate Section 2 of the Sherman Act, and in a memorandum filed in support thereof stated:

> We concede that the statute (Bank Merger Act of 1966) is applicable to the *merger of the defendants.* It therefore creates a *conclusive presumption* that the merger *did not violate* Section 1 of the Sherman Act, and removes *the legal support for the presently outstanding order of divestiture, which is based upon that Section.* (emphasis added).

On February 1, 1967, the district court overruled this motion, and the United States filed a notice of appeal from this order. Thereafter, on August 7, 1967, the United States and the defendant banks tendered the so-called consent judgment for entry unless the United States withdrew its consent within thirty days (later extended to forty days). The United States agreed to dismiss its appeal to this Court if the consent judgment was entered. At this juncture Boyle and Central Bank filed their respective motions to intervene and their intervening complaints.

The United States in sponsoring the so-called consent judgment, *completely abandoned* its prior and *successful* contention to the district court that divestiture is the *only* adequate remedy when the restraint of trade constituting a violation of the Sherman Act is caused by eliminating competition between consolidating corporations, and contended that the insignificant

restrictions in the so-called consent judgment were sufficient to cure the harmful effects of a monopoly (Section 2 violation).

On December 29, 1967, the district court entered the so-called consent judgment which stated: "Now, therefore, *upon the consent of the parties hereto,* it is hereby ordered, adjudged, and decreed as follows." (App. D *infra,* p. 11a). However, as previously stated the intervening "parties plaintiff" did not consent to this judgment.

The district court's reason for not holding the Act unconstitutional is disclosed by the following language in the December 29, 1967 opinion (App. B, *infra,* pp. 7a-8a):

> The attack upon the Bank Merger Act of 1966 as unconstitutional is not well taken. The *litigation was not final,* notwithstanding the fact that an order directing divestiture had been entered, as the order itself *retained* the case on the docket for the purpose of *guiding* and *determining whether or not any action on the part of the defendants contravened the directive of the order.* Nothing had been done toward carrying out the orders of the court and no report of progress had been made of record. To deny the Congress the right to enact legislation finally settling *a question of fact* that was still open and subject to further orders of the court, would invite a *criticism* of ignoring the separation of powers assured by the Constitution to a much greater extent than is urged here by the intervenors in the criticism of the Congressional enactment involved. (emphasis added).

Clearly, the Act was held constitutional only because the district court thought (a) that retention of the case on the docket prevented the final judgment entered on March 18, 1965, from being a final judgment

which could not be vacated by Congress, and (b) that the question whether a statute has been violated is a "question of fact" which Congress could determine.

The concluding paragraph of the March 18, 1965 order which retained the case on the docket reads (App. G, *infra*, p. 22a):

> Jurisdiction is retained for the purpose of enabling any of the parties to apply to this Court for such orders and directions as may be necessary for the construction or carrying out of this order, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Significantly, the concluding paragraph of the December 29, 1967, so-called consent judgment (captioned "final judgment") reads (App. D, *infra*, p. 14a):

> Jurisdiction is retained by this Court for the purpose stated in the Section VI of this *Final Judgment* and for the purposes of enabling any party to this *Final Judgment to apply to this Court* at any time for such further orders and directions as may be necessary or appropriate for the construction or carying out of this Final Judgment the modification or termination of any provision thereof, for the enforcement of compliance herewith, and for the punishment of violations hereof. (emphasis added).

The term "final judgment" is employed twenty times in the so-called consent judgment and the stipulation filed therewith to describe that judgment. Yet, it is retained on the docket as was the final judgment of March 18, 1965.

THE QUESTIONS ARE SUBSTANTIAL

Each of the foregoing questions are raised by specific averments in Boyle's intervening complaint (App. J, *infra,* pp. 29a-31a) and his motions. Each question is a substantial question sufficient to reverse the judgments of the district court appealed from herein.

Violation of Principle of Separation of Powers

Surely a substantial question is presented when this Court squarely held in a final judgment that the consolidation violated Section 1 of the Sherman Act and Congress 22 months later conclusively presumed (adjudicated) that the consolidation did not violate that section and that the final judgment of this Court and the final judgment of the district court be vacated.

This question is of great national concern because, if the final judgment of this Court and the final judgment of the district court can be vacated by this Act and if Congress can "conclusively" presume that Section 1 of the Sherman Act and other antitrust laws were not violated by certain transactions, then Congress can (a) vacate any federal court judgment and (b) "conclusively" adjudicate whether any federal statute has been violated.

The opinion of the district court will set a dangerous and incorrect precedent of tremendous national importance unless this Court reverses it.

There can be no possible doubt that Section 2(a) of the Act purports to strike down "a final judgment under the antitrust laws" which has *not* been fully executed. Under the authorities herein cited Section

2(a) of the Act violates the principle of separation of powers and is unconstitutional.

If Congress changes a statute *before* the time for appeal or re-hearing of a judgment has expired or while such judgment is pending on appeal or re-hearing, the new statute may affect the judgment, if it is otherwise valid. See *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964); *Western Union Tel. Co.* v. *Louisville & Nashville R.R.*, 258 U.S. 13 (1922).

However, the law is well settled that Congress has no power to open or vacate final judgments. 1 Black, *Judgments*, § 298, at pp. 371-74 (1891); 1 Cooley, *Constitutional Limitations* 190 (8th ed); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967) ("No one, except this Court, has authority to alter or modify our mandate."); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948); *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961); *United States* v. *O'Grady's Executors*, 89 U.S. (22 Wall.) 641 (1875); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (cites three circuit court decisions, each holding that a decision of a federal court cannot be vacated, modified or altered by the legislature); *Schoen* v. *Mountain Producers Corp.*, 179 F.2d 707, 713 (3d Cir.), *cert. denied*, 336 U.S. 937 (1949) ("to apply the subsequently enacted provisions of Section 1406 (a) would involve the retroactive annulment of a judgment validly entered by the district court. This the statute did not and could not do.") *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 261-62 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); *Hosier* v. *Aderhold*, 71 F.2d 422 (5th Cir. 1934); *United*

States ex rel. Nerbonne v. *Hill*, 70 F.2d 1006, 1007 (3d Cir.), *cert. denied*, 291 U.S. 658, 292 U.S. 634 (1934): ("[t]he law seems to be well settled that a repeal, after final judgment, will neither vacate the judgment nor arrest the execution of a sentence partly executed under the judgment"); *United States ex rel. Behen* v. *Ruppal*, 6 F. Supp. 346, 347 (S.D. Ill. 1934) ("[t]he general rule with reference to a final judgment in both civil and criminal cases seems to be that no act of a legislative body can affect a valid subsisting judgment").

In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp., supra*, this Court said:

> Judgments within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by *another Department of Government.* (333 U.S. at 113) (emphasis added).

Again, in *United States* v. *O'Grady's Executors, supra*, the Supreme Court said:

> Judicial jurisdiction implies the power to hear and determine a cause and, inasmuch as *the Constitution does not contemplate that there shall be more than one Supreme Court*, it is quite clear that *Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the Government.* (89 U.S. (22 Wall.) at 647-648) (emphasis added).

In *Battaglia* v. *General Motors Corp., supra*, the court upheld the constitutionality of the Portal-to-Portal Act because "[i]t left valid final judgments for portal-to-portal pay." (169 F.2d at 262).

In *Western Union Tel. Co.* v. *Louisville & Nashville R.R.*, 258 U.S. 13 (1922), a state court judgment had ordered condemnation of the railroad's right of way, and while the judgment was *pending on appeal* the legislature passed an act protecting railroads from condemnation of rights of way. This Court gave effect to the statute because the judgment was still pending on appeal but made clear that no effect would have been given to the statute if the judgment had been final.

The foregoing authorities establish that the provisions of Section 2(a) of the Act which attempt to strike down a "'final judgment under the antitrust laws'' are unconstitutional, irrespective of whether the March 18, 1965, judgment of the district court or the April 6 judgment of this Court are final judgments.[11]

The judgment rendered by this Court April 6, 1964, and the judgment of the district court entered March 18, 1965, are final judgments because they decided all the issues involved "on the merits" and the fact that supervisory, ministerial and executory acts remained to be done did not destroy their finality. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *St. Louis, Iron Mountain & Southern Ry.* v. *Southern Express Co.*, 108 U.S. 24, (1883); *Bronson* v. *La Crosse & Milwaukee* R.R., 67 U.S. (1 Black) 524 (1863); *In re Casaudoumecq*, 46 F. Supp. 718 (S.D. Calif. 1942); 50 C. J. S. *Judgments* § 620, at p. 43-44 (1947).

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[11] If those judgments are still in full force and not affected by the Act, there is no necessity to determine the other constitutional questions raised herein. Otherwise, it is necessary to determine some or all of the other constitutional questions.

The court in *In re Casaudoumecq, supra,* reviewed prior cases and summed the law up as follows:

> A decree is none the less final because some future orders of the court may become necessary to carry it into effect. If the judgment disposes of the merits of the particular matter before the court and terminates the controverted issues, the fact that further proceedings remain to be taken in court to make it effective does not interfere with its finality. (46 F. Supp. at 723).

Clearly under the foregoing cases the judgment of this Court (376 U.S. 665) was final when the time for filing a petition for a rehearing expired. No one, including Congress, could thereafter decide or adjudicate that the consolidations did not violate the Sherman Act. All that remained to be done was for the district court to carry out the mandate of this Court in accordance with the guidelines set forth in other decisions of this Court. See *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 186 (1944); *United States* v. *du Pont & Co.,* 366 U.S. 316, 322-23 (1961). The only question with regard to this case which could conceivably come before this Court in the future was whether its final judgment was being properly executed. As stated in the *Brown Shoe* case, the questions already decided by this Court were "thereafter foreclosed." The judgment of this Court became *res judicata.*

Likewise, when the time for appeal from the March 18, 1965, judgment of the district court expired that judgment became final and *res judicata.* See *The General Pinkney,* 9 U.S. (5 Cranch) 281 (1809); *Jenckes* v. *Mercantile Nat'l Bank,* 407 S.W. 2d 260, 263-65 (Tex. Civ. App. 1966); 50 C. J. S. *Judgments* § 620 at 43-44 (1947). There was no longer any avenue

of approach to this Court to question the wisdom or adequacy of that judgment. Surely, the deliberate attempt of Congress to undo it and the judgment of this Court must fail or the power of the courts and confidence in court judgments will be seriously shaken.

The district court in support of its conclusion (1) that "the litigation is not final" and (2) that Congress had "the right to enact legislation finally settling a question of fact that was still open and subject to further orders of the court" cited *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), and *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940). Neither of those cases support that conclusion.

In the *Wheeling Bridge* case this Court held that the bridge obstructed free navigation *in violation of the statutes* and ordered that the bridge be removed or elevated and *enjoined "defendants against any reconstruction or continuance."* Consequently, the injunction was one that continued indefinitely in the future.

Before the judgment was carried out, the bridge was, by an act of Congress, made a post road for the passage of the mails, and its owners were authorized "to have and *maintain* it at its present site and elevation."

Subsequent to the enactment of the new act, the bridge was practically destroyed by a windstorm and the owners were *in the process of rebuilding* it when the plaintiff (the State of Pennsylvania) applied for an injunction to *enjoin construction* and *enforce the decree. The injunction was granted because the owners did not appear.* The owners thereafter moved to dissolve the injunction. This Court (1) which had original jurisdiction required the plaintiff to pay the

costs awarded in the judgment because those rights were "private rights" *vested* by the judgment, and (2) dissolved the injunction in its discretion because (a) the injunction had been granted to prevent obstruction of free navigation in violation of the then existing law which was changed by the new legislation making the construction and maintenance of the bridge permissible *in the future,* and (b) it would be a vain and useless act to require enforcement of the injunction when the new statutes made reconstruction and maintenance of the bridge lawful in the future.

Section 2(a) of the Act adjudicated that Section 1 of the Sherman Act had not been violated even in those cases where the courts had held that Section 1 had been violated. Clearly, Congress intended to strike down the judgment of this Court (376 U.S. 665) because it is and was the only known judgment in existence which could have come within the term "a final judgment under the antitrust laws" used in Section 2(a). In the case at bar, if the divestiture had been carried out, the banks could not now consolidate in violation of Section 1 of the Sherman Act. The enforcement of the final judgment of this Court and the final judgment of the district court would not be a useless act today any more than it would have been the day of the aforesaid judgments became final.

The *Paramino Lumber* case cited by the district court did not even involve a court judgment and is distinguished in the Jurisdictional Statement of Central Bank and will not be further discussed herein.

The act is also unconstitutional because it adjudicates that various transactions (acquisition of assets and assumption of liabilities) which "involve an insured

bank" did not violate Section 1 of the Sherman Act and certain other antitrust laws. This is a usurpation of an exclusive judicial function to determine after a trial or hearing upon adequate notice to interested parties, production of evidence, cross-examination, etc., whether a statute has been violated. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 296 (1936), and *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

Deprivation of Private Rights Vested Under Final Judgment

Section 2(a) of the Act is unconstitutional because by vacating and nullifying final judgments under the antitrust laws it impairs and destroys in violation of the Due Process Clause of the Fifth Amendment, valuable private rights vested by those judgments.

Boyle, by intervening individually and as a representative of First National and Security Trust, is seeking to protect rights vested by the March 18, 1965, final judgment. He has intervened not "to bring in digressive issues, nor to impeach the existing decree. [His intervention] is a vindication of the decree." *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U.S. 502, 508 (1941).

That judgment required the re-creation of Security Trust in such a manner as to make it "the equivalent of the former Security Trust Company at the time of its consolidation" with First National (App. G, *infra*, p. 20a), and what remained of the consolidated bank would be the equivalent of the former First National. Therefore, that judgment vested in both First National and Security Trust the right to be recreated and in Boyle the right to hold stock in the recreated banks, as he had prior to their consolidation.

The destruction of these rights, and other vested private rights already mentioned herein, by the Act of 1966 amounts to the taking of property without due process of law in violation of the Fifth Amendment. This Court has defined a constitutionally vested right as ' "an immediate fixed right of present or future enjoyment,' " and ' "an immediate right of present enjoyment, or a present fixed right of future enjoyment.' " *Pearsall* v. *Great Northern Ry.*, 161 U.S. 646, 673 (1896). The right of the banks to existence became an "immediate fixed right" at the time the lower court's divestiture decree became final.

This Court has repeatedly stated that the private and personal rights which become vested in a final judgment are protected by the Constitution. *E.g., Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917); *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922); *Truax* v. *Corrigan*, 257 U.S. 312 (1921); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454 (1870); *McCullough* v. *Virginia*, 172 U.S. 102 (1898) *Memphis* v. *United States*, 97 U.S. 293 (1877); *City of Paris* v. *Kentucky Util. Co.*, 280 Ky. 492, 133 S.W. 2d 559, 562 (Ct. App. 1939); *Jenckes* v. *Mercantile Nat'l Bank*, 407 S.W. 2d 260 (Tex. Civ. App. 1966); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856).[12]

It is well established that private rights which are interblended or incidental to public rights are entitled to protection under the Due Process Clause. *Missouri-Kansas Pipeline Co.* v. *United States* 312 U.S. 502,

[12] The *Wheeling Bridge* case fully supports Boyle's position and is strongly relied upon by him. That case recognizes the general rule that Congress cannot vacate a final judgment, and cannot destroy private rights vested under a final judgment.

509 (1941); *Auto Workers* v. *Scofield* 382 U.S. 205 (1965); *Hodges* v. *Snyder,* 261 U.S. 600 (1923). *United States* v. *United States Gypsum Co.,* 124 F. Supp. 573, 579 (D.D.C. 1954), rev'd on other grounds, 352 U.S. 457 (1957).

In the *United States Gypsum* case, *supra,* the court said:

> Often, in this readjusting process, a decree provides not only for duties but also for rights *inter se* the parties. Where such rights are given, *they carry to the recipient party the right to urge compliance, within the limits of the decree.* (124 F. Supp. at 579 (emphasis added).

In *Missouri-Kansas Pipeline case,* supra., the Court said:

> We recognize the duty of expeditious enforcement of the anti-trust laws. But expedition cannot be had at the sacrifice of rights *which the original decree itself established.* (312 U.S. at 509) (emphasis added).

Section 2(a) of the Bank Merger Act takes away rights of First National, Security Trust and Boyle—rights vested by the final decree of divestiture entered by the lower court. Therefore, to the extent that the Bank Merger Act takes away those rights it must be declared unconstitutional, and the court's final judgment of divestiture must be enforced.

Arbitrary Discrimination

The Act is unconstitutional in that it arbitrarily and unreasonably discriminates (a) between insured banks, (b) between uninsured and non-insured banks, and (c) between insured banks and other persons subject generally to the antitrust laws. Such patent discrimina-

tion is conclusively shown by the following *hypothetical* examples of the treatment of certain transactions under the Act:

1. *Discrimination Between Insured Banks.* On January 1, 1966 two *insured banks* located in Nashville, Tennessee consolidated and on the same day two insured banks in Memphis, Tennessee consolidated. It is stipulated that both consolidations violated Section 1 of the Sherman Act. The United States prepared a separate complaint attacking each consolidation as being in violation of Section 1. The action attacking the Nashville consolidation was "initiated" by filing the complaint in the district court on February 19, 1966. The United States intended to file the complaint attacking the Memphis consolidation on February 22, 1966. Under Section 2(b) of the Act, the Nashville action may be prosecuted to judgment (with a "new" substantive rule of law to be applied) and a divestiture may be properly ordered. However, the consolidation of the Memphis banks cannot be attacked simply because it is a "consolidation . . . as to which no litigation was initiated by the Attorney General" prior to February 21, 1966. Consequently, entirely different treatment is retrospectively accorded the two consolidations, and no reasonable basis exists which would justify such gross discrimination between the treatment of two practically identical fact situations. Surely this is unconstitutional discrimination.

2. *Discrimination Between Insured and Non-Insured Banks.* On May 1, 1963, two non-insured banks located in San Francisco, California, consolidated and on that same date two insured banks located in Los Angeles, California consolidated. Both consolidations clearly violate Section 1 of the Sherman Act. As of

this very moment the United States may file a complaint under Section 1 of the Sherman Act attacking the consolidation of the non-insured banks and proceed to judgment, but under Section 2(a) of the Act, the merger of the insured banks is "conclusively presumed to have not been in violation of" Section 1 of the Sherman Act.[13]

3. *Other Examples of Discrimination:* a. On June 16, 1963, a transaction (merger, acquisition of assets, etc.) involving an insured bank was consummated. A similar transaction involving an insured bank was consummated on June 17, 1963. Under Section 2(a) of the Act, the first transaction is "conclusively presumed" not to have been in violation of Section 1 of the Sherman Act, but no such presumption arises as to the second transaction.

b. Prior to June 17, 1963, a non-banking corporation participated in an "acquisition of assets" in which an "insured bank" was involved. That transaction is "conclusively presumed" not to have been in violation of Section 1 of the Sherman Act. If, however, an identical transaction involving an "insured bank" occurred on or after June 17, 1963, no such presumption arises.

c. The procedural provisions of the Bank Merger Act of 1966 create a *new defense* to the antitrust laws. *United States* v. *First City Nat'l Bank,* 386 U.S. 361

[13] There is no reasonable basis whatsoever for this discrimination against non-insured banks because insurance of bank deposits has no bearing on whether a consolidation or other combination results in a monopoly or undue restraint of trade. If anything, insurance of bank deposits adds to the financial strength of a bank to restrain trade or monopolize and should be a factor tending to require enforcement of the antitrust laws rather than special favors and exemption from enforcement.

(1967). Such new defense is available solely to *insured banks*—no one else. All non-insured banks and all other corporations of a financial nature or otherwise are discriminated against by not having this special defense to the antitrust laws.

Further examples of how Section 2 of the Act discriminates arbitrarily and unreasonably between banks and between banks and other corporations could be given.

The foregoing analysis demonstrates beyond any question the unconstitutional discrimination in violation of the Due Process Clause of the Fifth Amendment which is inherent in the Act. The reasoning of this Court in *Schneider* v. *Rusk*, 377 U.S. 163 (1964) is indistinguishable in its application to this case. In the *Schneider* case a naturalized citizen (German by birth) challenged the constitutionality of an act depriving a naturalized citizen (but not a native born citizen) of his American citizenship for residing continuously for three years in the foreign state of which he was formerly a national. In holding such act unconstitutional because of its discriminatory treatment of native born and naturalized citizens, this Court stated that: "... the Fifth Amendment, [forbids] discrimination that is 'so unjustifiable . . . as to be violative of due process.' " (377 U.S. at 168). As there, so here—the Act is *"unjustifiable"* as to the different treatment of banks. See also, *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

District Court Had No Jurisdiction To Enter Consent Judgment

The sole jurisdiction of the district court was to proceed in accordance with the final judgment of this Court. *Pike Rapids Power Co.* v. *M., St. P. & S.S.M.*

Ry., 106 F.2d 891 (8th Cir. 1939); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). No one could re-open, modify or vacate the final judgment of this Court except this Court. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra; Rogers* v. *Consolidated Rock Prods. Co.*, 114 F.2d 108 (9th Cir. 1940). In the *El Paso* case, this Court stated: "No one, except this Court, has authority to alter or modify our mandate." (386 U.S. at 136).

Even if the district court had power to vacate its own judgment of March 18, 1965, it should nevertheless exercise such power only in accordance with the Federal Rules of Civil Procedure (Rule 60(b)) which were not followed.

The record is clear that no motion was filed in accordance with the Federal Rules of Civil Procedure (Rule 60(b)) to vacate the final judgment of the district court entered March 18, 1965 and no judgment or order was ever entered by this Court vacating its final judgment rendered April 6, 1964. Therefore, the so-called consent judgment is a complete nullity.

Even If the Court Had Jurisdiction To Enter the Consent Judgment, the Court Should Not Have Entered It

The facts and law showing that the district court should not have entered the so-called consent judgment for the additional reason that it does not cure the harmful effects of a monopoly (violation of section 2 of the Sherman Act) are fully discussed in the Jurisdictional Statement filed by Central Bank, and to avoid unnecessary duplication, that portion of that statement is incorporated herein by reference and will not be further discussed, except to emphasize that Boyle in his pleadings relied on this point and still relies upon it and concurs in the statements made by Central Bank.

CONCLUSION

For all of the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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March 1968

APPENDIX